STATE OF MICHIGAN

IN THE SUPREME COURT

Supreme Court No. 130748

LAURENCE G. WOLF CAPITAL MANAGEMENT TRUST AGREEMENT DATED MARCH 7, 1990 and LAURENCE WOLF, as Trustee and individually,

Plaintiffs/Appellees,

v.

CITY OF FERNDALE, MARSHA SCHEER, ROBERT G. PORTER and THOMAS W. BARWIN,

Defendants/Appellants.

COA No. 262721

Circuit Court No. 03-051450-CK
Hon. Edward Sosnick

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PLAINTIFFS/APPELLEES' SUPPLEMENTAL BRIEF OPPOSING THE GRANT OF LEAVE FOR APPEAL OR OTHER RELIEF

CERTIFICATE OF SERVICE

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QUESTIONS INVOLVED

1. Whether governmental entities in the State of Michigan may claim governmental immunity when committing an intentional tort and when engaged in a proprietary activity so long as the damage caused by the intentional tort is not to physical property?

Appellants Answer:	Yes.
Appellees Answer:	No.
The Court of Appeals Would Answer:	No.
The Supreme Court should Answer:	No.

INTRODUCTION

The narrow question framed by this Court's request for additional briefing is simply whether governmental units of this State may engage in proprietary activity, commit an intentional tort and harm the interests of other private Michigan businesses with impunity. More specific to this case, did the legislature intend that the City of Ferndale could intentionally steal the business opportunity of one of its own citizens and be immune from liability for such tortious conduct because "physical" property damage was not suffered by the citizen?

At base, the City of Ferndale is asking this Court to modify the long-standing "proprietary function" test for liability under MCL 691.1413. The City would have this Court add the requirement that not only must the function be proprietary to avoid immunity, the injury resulting from any alleged intentional misconduct during a proprietary activity must cause physical damage to a person or property to avoid the application of immunity. In other words, if the proprietary activity causes non-physical injury to a citizen, regardless of severity, bad faith or intent, the City of Ferndale claims the government is immune. There is no legal or policy justification for such a position. Holding for the City would vastly change the most basic understanding of the proprietary function exception to governmental immunity.

At base, the beginning an end of any real inquiry here rests with this Court's decision in *Ross v. Consumers Power Company*, 420 Mich. 567, 363 N.W.2d 641 (1984). There, this Court engaged in an extensive historical analysis of immunity in Michigan. This analysis confirmed that immunity has essentially only existed when the government engages in a "governmental" function. Immunity has historically not been recognized for activities that are proprietary. The City's attempt to extend immunity to proprietary activities based on the type of damages involved is an abrogation of Michigan precedent.

The Court should deny leave and allow the Court of Appeals' decision in this matter to stand.

STATEMENT OF FACTS

Consistent with the Court's order regarding additional briefing, Plaintiffs will not repeat the facts provided in their response to the application for leave. The facts set forth in that response are hereby incorporated in this brief.

ARGUMENT

I. The Ross Holding And Its Historical Analysis Confirm Wolf's Arguments

The present issue can trace its roots back to the twin concepts contained within sovereign immunity. The two sides of the sovereign immunity coin are (1) sovereign immunity from suit and (2) sovereign immunity from liability. *See*, *generally*, *Ross*, 420 Mich. at 600-02, 363 N.W.2d at 652. Sovereign immunity from suit is not at issue here, the City may be brought before the Court's of this State. The question is whether the City has immunity from liability.

Tracing back the concept of sovereign immunity, there is no support for a position that sovereign immunity from liability arises when the government engages in a proprietary activity. That is, when engaged in a proprietary activity, governmental units have historically not enjoyed sovereign immunity from liability: "In addition, sovereign immunity from tort liability was recognized as a defense only when the state was engaged in the exercise or discharge of a governmental function." *Ross,* 420 Mich. at 601-02, 363 N.W.2d at 652, *citing Daszkiewicz v. Detroit Bd. of Ed.,* 301 Mich. 212, 220, 3 N.W.2d 71 (1942); *Thomas v. Dep't of State Highways,* 398 Mich. 1, 11, fn. 5, 247 N.W.2d 530 (1976); *Bofysil v. Dep't of State Highways,* 44 Mich.App. 118, 126, 205 N.W.2d 222 (1972), *lv. den.* 389 Mich. 768 (1973).

In *Ross*, this Court held that: "A governmental agency which performs a proprietary function is not immune from tort liability pursuant to § 13." This Court went on to state:

> Whenever a governmental agency engages in an activity which is not expressly or impliedly mandated or authorized by constitution, statute, or other law (*i.e.,* an *ultra vires* activity), it is not engaging in the exercise or discharge of a governmental function. The agency is therefore liable for ***any injuries or damages*** incurred as a result of its tortious conduct. [*Ross*, 420 Mich. at 620 (emphasis added).]

This Court's statement should end the inquiry in this case. There has never been any doubt that once a proprietary activity is established, the governmental entity can be liable for all damages flowing from tortious conduct as recognized in *Ross*.

The Court should affirm this long standing precedent.

II. The City's Arguments Requires The Insertion Of The Word "Physical" Before The Word "Property" In Section 13

The City's basic argument is that the "damage" referred to in Section 13 requires "physical" damage to property. That is, unless a citizen suffers a physical injury to his person or property even where the City is engaged in a proprietary activity, immunity still applies. The City relies upon the following for this position:

> The immunity of the state shall not apply to actions to recover for bodily injury or property damage arising out of the performance of a proprietary function as herein defined. [MCL 600.1413.]

The Court will quickly note that Section 13 contains no reference to "physical" injury to property as a requirement to avoid immunity.

A. *The Court Of Appeals Properly Concluded That Wolf Seeks The Type Of Damages Allowed By Section 13*

1. The Proper Definition For "Propert"y Was Used

The Court of Appeals considered that the term "property" has a broad meaning in Michigan law. This finding was supported by this Court's decision in *Citizens for Pretrial Justice v. Goldfarb,* 415 Mich. 255, 268; 327 N.W.2d 910 (1982). The Court of Appeals recognized that when interpreting a statute, even if it must do so narrowly, it is not to abandon the legislature's intent and the ordinary meaning of the words. Opinion, 269 Mich.App. 265; *citing Koontz v. Ameritech Services, Inc.,* 466 Mich. 304, 312; 645 NW2d 34 (2002) and *People v. Lee,* 447 Mich. 552, 558; 526 NW2d 882 (1994).

Michigan Courts have long permitted property damages as the measure of damages in tortious interference claims. *Peter Bill & Associates, Inc. v. Michigan Department of Natural Resources*, 93 Mich.App. 724, 733, 287 N.W.2d 334 (1980). In *Peter Bill*, plaintiff alleged that the DNR tortiously interfered with its efforts to salvage cargo from the S.S. Monrovia resting on the bottom of Lake Huron. The court rejected the State's argument that the trial court erred in awarding plaintiff the value of the steel remaining on the S.S. Monrovia:

> Since defendant's acts caused failure of the project, plaintiff was deprived of the steel remaining to be salvaged. Limiting plaintiff's damages to lost profits would be unjust, for profits were calculated on the assumption that a half-million dollars of steel would offset expenses (most of which were already incurred at the time of defendant's acts). Thus, the trial court properly used the value of the remaining steel as the basic measure of damages.

Peter Bill, 93 Mich. App. at 733. Thus, Michigan courts have long recognized tortious interference damages measured by property damage and by lost profits.

2. *The Definition Used By The Court Of Appeals Is Consistent With The Application Of Other Michigan Statutes*

The Court of Appeals' Opinion is also correct because the City's arguments would require language routinely used by the legislature to have two different meanings depending upon the statute in which the language rests. Reading the language differently depending on the statute is not consistent with Michigan rules of statutory construction.

The Legislature is presumed to use words that have been subject to judicial interpretation in the sense in which they have been interpreted. MCL 8.3a; *Kirkley v. General Baking Co.*, 217 Mich. 307, 316, 186 N.W. 482 (1922). The Legislature is presumed to understand the meaning of the language it enacts into law, statutory analysis must begin with the wording of the statute itself. *Carr v. General Motors Corp.*, 425 Mich. 313, 317, 389 N.W.2d 686 (1986). Each word of a statute is presumed to be used for a purpose, and, as far as possible, effect must be given to every clause and sentence. *Univ of Mich. Bd. of Regents v. Auditor General*, 167 Mich. 444,

450, 132 N.W. 1037 (1911). The Court may not assume that the Legislature inadvertently made use of one word or phrase instead of another. *Detroit v. Redford Twp.*, 253 Mich. 453, 456, 235 N.W. 217 (1931). The Legislature is presumed to use words that have been subject to judicial interpretation in the sense in which they have been interpreted. MCL 8.3a; *see also Kirkley v. General Baking Co.*, 217 Mich. at 316.

Importantly, Michigan Courts have interpreted the legislative phrase "property damage" to encompass tortious interference claims where the phrase "property damage" is used in the applicable three-year statute of limitations for such claims. *See Wilkerson v. Carlo*, 101 Mich.App. 629, 300 N.W.2d 658 (1981) ("the type of interest allegedly harmed is the focal point in determining what limitations period controls and three-year statute of limitations applies to tortious interference claims); *James v. Logee*, 150 Mich.App. 35, 388 N.W.2d 294 (1986) (three-year period of limitations applies to tortious interference claims, which are common law torts). The limitations statute reads:

> ***Injuries to persons or property***. Sec. 5805. (1) A person shall not bring or maintain an action to recover ***damages for injuries to persons or property*** unless, after the claim first accrued to the plaintiff or to someone through whom the plaintiff claims, the action is commenced within the periods of time prescribed by this section.
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> * * *
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> (10) The period of limitations is 3 years after the time of the death or injury for all other actions to recover ***damages*** for the death of a person, or ***for injury to a person or property***. [MCL 600.5805.]

Michigan Courts have found that tortious interference claims fall within this definition. *Joba Constr. Co. v. Burns & Roe, Inc.*, 121 Mich.App. 615, 625, 329 N.W.2d 760 (1982) (tortious interference is subject to the three-year period of limitation); *DSX, Inc. v. Siemens Medical Systems, Inc.*, 100 F.3d 462, 471 (6th Cir. 1996) (MCL 600.5805 three-year statute of limitations applies to tortious interference with business relations claims, citing *James v. Logee*,

150 Mich.App. 35 (1986)); *Valente v. Valente*, 2004 WL 1778817, *5 (Mich.App. August 10, 2004) (same).

Thus, when the Legislature used the phrase "property damage" in the immunity statute, the Legislature knew and intended that tortious interference claims would be considered claims for "***property damage***" under the proprietary function exception because that's is the only way to read the language consistently with prior interpretations of the same language.[1] *See also Robinson v. City of Detroit,* 462 Mich. 439, 613 N.W.2d 307 (2000). (considering use of similar terms in other statutes in construing Governmental Immunity Act exception).

In sum, the City advocates a too narrow construction of the term "property damage" in MCL 691.1413 and does so in such a way as to create an inconsistency as to the meaning of "property damage" under Michigan law.

B. *The Basic Definition Of "Property" Confirms That More Than Just "Physical" Property Is Covered By Section 13*

A fundamental concept to the law of property generally is the understanding that property has a broad reach, which includes more than land or physical personal property that one can possess. "Property" includes a panoply of concepts stretching beyond interests that can suffer "physical" harm but which can none the less be "damaged."

Black's Law Dictionary defines "Property" as:

> That which is peculiar or proper to any person; that which belongs exclusively to one. In the strict legal sense, an aggregate of rights which are guaranteed and protected by the government. The term is said to extend to every species of valuable right and interest. More specifically, ownership; the unrestricted and exclusive right to a thing; the right to dispose of a thing in every legal way, to possess it, to use it, and to exclude everyone from interfering with it. That

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[1] MCL 600.5805 was enacted under the Public Acts of 1961 and took effect January 1, 1963. MCL 691.1413 was enacted under the Public Acts of 1964 and took effect July 1, 1965. Thus, the statute of limitation statute pre-dates the immunity statute. Both contained the similar "property damage" language when enacted.

> dominion or indefinite right of use or disposition which one may lawfully exercise over particular things or subjects. The exclusive rights of possession, enjoying and disposing of a thing. The highest right a man can have to anything; being used to refer that that right which one has to lands, tenements, goods or chattels, which no way depends on another man's courtesy. [Black's Law Dictionary, 845-46 (Abridged 6th Edition 1991).]

The text goes on to say:

> The word is also commonly used to denote everything which is the subject of ownership, corporeal or incorporeal, tangible or intangible, visible or invisible, real or personal; everything that has an exchangeable value or which goes to make up wealth or estate. It extends to every species of valuable right and interest, and includes real and personal property, easements, franchises, and incorporeal hereditaments, and include every invasion of one's property rights by actionable wrongs. [*Id.*]

Here, Wolf was undeniably injured in his "property" when the City interfered with his business. "[A] person's business is property in the pursuit of which he is entitled to protection from tortious interferences by a third person who, in interfering therewith, is not acting in the exercise of some right, such as the right to compete for business...." *NAACP v. Overstreet*, 142 S.E.2d 816, 823 (Ga. 1965) (Exhibit A). Tortious interference is within the scope of "harm to property." *Adkins v. Thomas Solvent Co.*, 440 Mich. 293, 330, 487 N.W.2d 715 (1992) (Levin, J. dissenting); *see also Detroit v. Campbell*, 146 Mich.App. 295, 380 N.W.2d 88 (1985) (an owner may receive compensation for lost customers when forced to relocate after the exercise of eminent domain).

In sum, just because Wolf's property was not physically "touched" or "damaged", it does not mean that his "property" injury is any less real because intangible rights can be equally harmed.

C. *Finding That Immunity Does Not Exists Here Is Consistent With The Law Across The United States*

The situation presented in this lawsuit is not unique to Michigan. In *Stephenson v. Town of Garner*, 524 S.E.2d 608 (N.C. App. 2000) (Exhibit B), the North Carolina court of appeals

addressed whether the Town of Garner was immune from suit for allegedly tortiously interfering with the plaintiff's contract to place a cellular tower on his lands where the town entered into an agreement to locate a cellular tower on township property. The court determined that the leasing of the cell tower was a proprietary activity, that the plaintiff might establish that he was damaged by the loss of the stream of income from his lease and that government immunity did not apply. *Id.* at p. 615.

The Ohio judiciary has also been faced with whether a governmental entity can be sued for damages not directly related to "physical" property damage consistent with its immunity laws. The Ohio statute at issue in *Allied Erecting and Dismantling Company, Inc. v. City of Youngstown*, 783 N.E.2d 523, 530 (Ohio App. 2002) (Exhibit C), provided:

> "(2) Except as otherwise provided in sections 3314.07 and 3746.24 of the Revised Code, political subdivisions are liable for injury, death, or loss to person or property caused by the negligent performance of acts by their employees with respect to proprietary functions of the political subdivisions."

This Ohio statute removed immunity for proprietary acts and did so for injury or loss to "property." This language is not entirely dissimilar to Michigan's use of "property damage" in Section 13. In reviewing the claims of the plaintiff, the court concluded that the plaintiff was entitled to breach of contract damages associated with its loss where the government was engaged in a proprietary activity.

The Texas case of *City of Corpus Christi v. Absolute Industries*, 120 S.W.3d 1 (Tex. App. 2001) (Exhibit D), also dealt with immunity, proprietary functions and claims for tortious interference. In finding that the challenged activity of the City of Corpus Christi was committed while performing a proprietary function, the Texas court noted that sovereign immunity does not extend to proprietary activity and stated: "Accordingly, when a municipality commits a tort

while engaged in a proprietary functions, it is liable to the same extent as a private entity or individual." *Id.* at 3.

This Court should reach a similar conclusion here. There is no limitation in Section 13 that only a certain category of injury is recoverable.

III. Public Policy Dictates A Finding That Immunity Is Not Limited To Physical Property Damage

The public policy of this State should not endorse allowing governmental units to compete in wholly proprietary activities without facing the same basic legal restraints as their competitors when it comes to tortious activity.

If this Court adopted the City's position in this matter, the government divisions of this State will be free to:

(a) tortiously interfere with business opportunities of the State's citizens;

(b) use proprietary materials of a third-party for its advantage without compensating the owner of the proprietary materials;

(c) defame or slander third-parties to further proprietary interests so long as no "physical" damage occurs; and

(d) use proprietary activity to achieve results not allowed by other laws.

This clearly is not what the legislature intended. The legislature created liability for governments when they enter the commercial arena to pursue commercial interests. That is, governments cannot have a commercial advantage associated with immunity when engaged in proprietary activities. *See, generally, Lisieki v. Detroit-Wayne Joint Building Authority*, 364 Mich. 565, 568-69, 111 N.W.2d 803 (1961). This is consistent with the historical application of immunity and there is no reason to believe the legislature sought to change that longstanding view.

Further, where does the "narrowness" of the City's argument regarding "property" damage end? Taken to its logical extreme, this Court could define "property" to mean only real property and not personal property. Such a reading would be a "narrow" construction to limit the abrogation of immunity. However, this illustrates the problem, why limit the injury to only real property? What rational is there for real property and not personal property except that such a limitation gives the "narrowest" result? There is no logical basis for drawing the line so narrowly, just as there is no basis for interpreting "property damage" as narrowly as the City advocates.

Finally, what confidence can the citizens of this State have in their governments where the City of Ferndale advocates that when it is engaged in a wholly proprietary activity, it may be immune from suit so ling as it does not "physically" injure a citizen or her property? Certainly the abrogation of immunity is a statutory creation, but it is hard to imagine a policy reason as to why the legislature would have found governmental units can be liable for the smallest physical injury to the property of a citizen but not liable for the most significant of injuries to the incorporeal rights of that very same citizen.

In short, the type of damages sought by Plaintiffs is covered by the term "property damage," and the Court of Appeals Opinion should stand.

CONCLUSION

For the above reasons, the Court should deny leave to appeal in this case and take no further action on this matter.

Respectfully submitted,

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